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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability  
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;  
MARK ZUCKERBERG, an individual;  
CHRISTOPHER COX, an individual;  
JAVIER OLIVAN, an individual;  
SAMUEL LESSIN, an individual;  
MICHAEL VERNAL, an individual;  
ILYA SUKHAR, an individual; and  
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond  
Swope, Dept. 23

**DEFENDANT FACEBOOK, INC.'S  
OPPOSITION TO BIRNBAUM & GODKIN,  
LLP AND GROSS & KLEIN, LLP'S EX  
PARTE APPLICATION REQUESTING  
LEAVE TO SUPPLEMENT THE MOTION  
TO BE RELIEVED AS COUNSEL**

Dept: 23 (Complex Civil Litigation)  
Judge: Honorable V. Raymond Swope

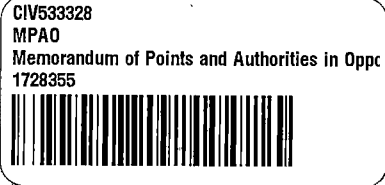
FILING DATE: April 10, 2015  
TRIAL DATE: April 25, 2019

**FILED**  
**SAN MATEO COUNTY**

MAR 26 2019

Clerk of the Superior Court

By M. Eiz  
DEPUTY CLERK



1 **I. INTRODUCTION**

2 Six4Three's lawyers first raised their request to withdraw on November 30, 2018—just days after  
3 this Court and Facebook learned of multiple violations of this Court's orders by Six4Three's principal  
4 and legal team. In the nearly four months since that original request, Six4Three's counsel have struggled  
5 to identify any basis for withdrawal. Indeed, even after multiple requests from the Court and Facebook  
6 to provide a factual basis for the supposed "unwaiveable conflict" they claim requires withdrawal,  
7 Six4Three's counsel have pointed only vaguely to Facebook's allegations of wrongdoing by the lawyers  
8 and clients working together to plan a crime or a fraud (which do not alone establish any conflict  
9 between lawyer and client), and have otherwise asserted privilege.

10 Now, over *110 days later*—after the briefing has long since been completed, the Court has heard  
11 oral argument, the Court questioned Six4Three's counsel, Mr. Kramer, and Mr. Scaramellino *in camera*,  
12 and the matter has been submitted for resolution by the Court—Six4Three's lawyers claim that they have  
13 some new information to support their request for withdrawal. The *ex parte* application is surprisingly  
14 scant on details. Most importantly, Six4Three's lawyers fail to explain why the Court's crime-fraud  
15 ruling does not render this "new information" unprivileged. To the contrary, Six4Three's lawyers *admit*  
16 that the "new information" is "directly relevant to the motion to withdraw." But by the lawyers' own  
17 arguments, that withdrawal motion sprang from *the very events* encompassed by the crime-fraud order.  
18 So, any communication relevant to that withdrawal motion must reasonably relate to the crime or fraud  
19 that Six4Three perpetrated in connection with disclosing Facebook's confidential and highly confidential  
20 information. It is thus unsurprising that, aside from a single, unsupported sentence suggesting that the  
21 supposed new information that is the subject of this *ex parte* application "does not implicate the alleged  
22 crime or fraud exception found by the Court," the *ex parte* application is completely silent on what the  
23 supposed new information does implicate, let alone how it could be relevant to the supposed unwaivable  
24 conflict that arose when Facebook asserted the crime-fraud exception but not relevant to the Court's  
25 ruling finding that the crime-fraud exception does apply.

26 Moreover, even if the Court were to accept Six4Three's unsupported and illogical contention that  
27 the crime-fraud exception is "not implicated" by the supposed new communication, that finding would  
28 not entitle Six4Three's lawyers to disclose the communication *in camera*. The lawyers invoke a

1 privilege exception that lets lawyers defend themselves by revealing attorney-client communications.  
2 *See generally* Cal. Evid. Code § 958. But that exception does not authorize an *in camera* hearing, and  
3 Six4Three’s counsel have not cited a single case in which it was found to support one. And more to the  
4 point, section 958 does not allow Six4Three’s counsel to have it both ways—they cannot rely on an  
5 exception to the attorney-client privilege to disclose facts in an effort to try to get out of the case, while  
6 arguing for an *in camera* proceeding that would deprive Facebook of the opportunity to respond to those  
7 facts and their import on the instant proceedings. Either (1) the “new information” falls within section  
8 958’s exception to attorney-client privilege and so there is no basis for *in camera* review, or (2) the “new  
9 information” does not fall under the exception and Six4Three’s lawyers cannot rely on it to support their  
10 withdrawal, absent a waiver of privilege by Six4Three (which Six4Three’s counsel do not assert<sup>1</sup>).  
11 There is no (3).

12 The bottom line is that the *ex parte* request to disclose the “new information” *in camera* should be  
13 denied. Because Six4Three’s counsel cannot rely on privileged information to support their request, the  
14 supposed new information is either subject to the Court’s crime-fraud ruling or it is subject to a section  
15 958 exception. In both instances, the information should be presented to the Court and to Facebook for  
16 consideration—not presented *in camera*. And at this stage in the proceeding, that supposed new  
17 information supporting withdrawal must be introduced via a duly noticed motion, to the extent (and only  
18 to the extent) authorized by Code of Civil Procedure section 1008. Short of that, the lawyers’ attempt to  
19 supplement the record is barred procedurally and by privilege rules that prevent the disclosure of  
20 attorney-client communications.

## 21 II. LEGAL ARGUMENT

### 22 A. Six4Three’s Lawyers May Address the Court, but Only in Connection with the

23

24 <sup>1</sup> As Facebook has explained in prior motions, Six4Three has waived privilege as to communications  
25 surrounding the improper disclosure of Facebook’s confidential and highly confidential information. The  
26 Court did not need to reach that issue because it found that the crime-fraud exception applied to those  
27 communications. However, insofar as the new attorney-client communication underlying the *ex parte*  
28 request relates to the improper disclosure of Facebook’s confidential and highly confidential information  
(which logic dictates that it must), the waiver would likely also extend to this communication. However,  
the Court need not resolve that question now because, as described herein, Six4Three’s counsel are not  
relying on a waiver of privilege by Six4Three and the outcome of this *ex parte* application does not turn  
on that issue.

1                   **Lawyers' Motions to Withdraw.**

2           Facebook does not object to the Murphy Pearson law firm filing this narrow *ex parte* application  
3 on behalf of Birnbaum & Godkin's motion to withdraw, or the Wilson Elser firm joining the application  
4 on behalf of Gross & Klein. But the firms' representation of Birnbaum & Godkin and Gross & Klein  
5 cannot spill over to Six4Three itself: neither Murphy Pearson nor Wilson Elser represents Six4Three. If  
6 they wish to do so, they should enter an appearance as counsel for Six4Three and the case can then  
7 proceed accordingly.

8           **B.     Six4Three's Lawyers' Request to Supplement Their Points and Authorities Is**  
9                   **Procedurally Improper While Their Motion Is Under Submission.**

10          California law is clear that Six4Three's lawyers may not unilaterally bombard the Court with  
11 "new information" while their withdrawal motion is pending. California Rules of Court, Rule 2.900(b)  
12 governs the submission of matters in trial courts and provides that, "[t]he court may vacate submission  
13 *only by issuing an order served on the parties stating reasons constituting good cause and providing*  
14 *for resubmission.*" (emphasis added). *See also* Cal. R. Ct., rule 2.2 ("The Trial Court Rules apply to all  
15 cases in the superior courts unless otherwise specified[.]"). Here, no such order has issued. Accordingly,  
16 Six4Three's lawyers' *ex parte* request to supplement their withdrawal authorities is procedurally  
17 improper.

18          Moreover, even *if* the lawyers' request was procedurally proper—it is not—Facebook would  
19 object to any procedure that bars Facebook from reviewing and responding to Six4Three's lawyers' "new  
20 information." At the outset, such review is necessary to determine whether—as Six4Three's lawyers  
21 assert without explanation or support—the supposed "critical new information" "*only came into*  
22 *existence on March 20, 2019[.]*" *Ex Parte* Appl. at 5:2–4 (emphasis added). Equally important, as  
23 Facebook has made clear in repeated filings since Six4Three's lawyers first moved to withdraw,  
24 Facebook would suffer concrete, immediate injury if Six4Three's lawyers withdraw before Six4Three  
25 lines up substitute counsel. Withdrawal would leave Six4Three unrepresented and unable to participate  
26 in the discovery that Facebook must obtain to learn, as the first step, who has Facebook's confidential  
27 and highly confidential information and what they have done with that information. Accordingly, due  
28 process demands that Facebook have an opportunity to test and be heard on any new arguments or

1 supposed new evidence offered in support of Six4Three's lawyers' withdrawal.

2 Notwithstanding these authorities, if the Court is inclined to grant Six4Three's lawyers'  
3 application, the Court should nevertheless hold them to the procedural requirements of California Rules  
4 of Court, Rule 3.1362. *See also* Michael Paul Thomas, *Cal. Civil Courtroom Handbook & Desktop*  
5 *Reference* § 14:17, Procedure (2018 ed.) (noting that "courts strictly apply" technical requirements of  
6 California Rules of Court, Rule 3.1362 in deciding motions to be relieved as counsel). Rule 3.1362  
7 governs motions to be relieved as counsel, and mandates that such motions include a "declaration on  
8 the *Declaration in Support of Attorney's Motion to Be Relieved as Counsel—Civil* (California Judicial  
9 Council Form MC-052)," which "state[s] in general terms and without compromising the confidentiality  
10 of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is  
11 brought[.]" Cal. R. Ct., rule 3.1362(b). This Court has already enforced the letter of this requirement,  
12 *see* Order Continuing Sua Sponte the Hearing on Motions to Withdraw at 2 (Jan. 24, 2019), and should  
13 maintain that vigilance now by requiring Six4Three's lawyers to file a rule-compliant declaration setting  
14 forth the "new information" that they wish to submit.

15 **C. Six4Three's Lawyers Cannot Present the "New Information" *In Camera* Because**  
16 **Any Information "Directly Relevant to the Motion to Withdraw" Falls Within the**  
**Court's Crime-Fraud Ruling.**

17 The Court's fourth question about Six4Three's lawyers' *ex parte* application is the critical one:  
18 does the supposed "new information" in "an attorney-client communication" have a reasonable relation  
19 to Six4Three's scheme to disclose Facebook's confidential and highly confidential information in  
20 violation of this Court's orders? *See Ex Parte* Appl. at 5:24–25; *see also BP Alaska Expl., Inc. v.*  
21 *Superior Court*, 199 Cal. App. 3d 1240, 1269 (1988).

22 Simple logic dictates that the answer to that question must be "yes." The *only* reason offered for  
23 Six4Three's lawyers' withdrawal was the purported "unwaivable conflict of interest between  
24 [Six4Three's lawyers] and SIX4THREE" brought about by Facebook's "allegations against both Plaintiff  
25 and Plaintiff's counsel and their attempts to direct discovery requests at [Six4Three's lawyers]."  
26 Birnbaum & Godkin Mem. in Supp. of Mot. to be Relieved as Counsel at 2 (Jan. 8, 2019). *See also, e.g.,*  
27 Godkin Decl. in Supp. of Mot. to be Relieved as Counsel at 1 (Jan. 8, 2019) ("Defendant's allegations  
28 directed at both Plaintiff and Plaintiff's counsel . . . make a prima facie showing of an unwaivable

1 conflict between attorney and client.”); Gross & Klein Mem. in Supp. of Mot. to be Relieved as Counsel  
2 at 3 (Jan. 8, 2019) (“[T]he very nature of Defendant’s allegations against Plaintiff and Plaintiff’s counsel  
3 . . . constitute a prima facie case of an unwaivable conflict between attorney and client.”). And,  
4 according to Six4Three’s counsel, the “new information” that they seek to introduce is “directly relevant  
5 to the motion to withdraw.” As a result, the supposed new information *must* by definition pertain to the  
6 alleged “conflict” and therefore to the subject matter of the Court’s crime-fraud ruling. *See Ex Parte*  
7 Appl. at 4:8–10.

8 Moreover, it defies common sense that the supposed new information could be about anything  
9 else. Between March 13 (the hearing on Six4Three’s lawyers’ motions to withdraw) and March 20 (the  
10 date that the “critical new information” allegedly came into existence, *see Ex Parte* Appl. at 5:3) the  
11 parties and the Court have focused solely on the consequences of Six4Three’s illegal disclosure of  
12 Facebook’s confidential and highly confidential information—the very acts that gave rise to the March  
13 15 crime-fraud ruling. Indeed, while Six4Three’s lawyers’ baldly assert that “[t]he communication  
14 involves representation that does not implicate the alleged crime or fraud exception found by the Court,”  
15 *see Ex Parte* Appl. at 6:7–8, they do not offer any evidence or explanation, or even argument, as to what  
16 else the supposed new information is about. In these circumstances, the unsupported assertion that the  
17 crime-fraud exception does not apply is not only inadequate on its face, but just plain unbelievable.

18 **D. Six4Three’s Lawyers Cannot Disclose Privileged Information *In Camera* Under**  
19 **Section 958.**

20 The crime-fraud analysis above is enough to deny Six4Three’s lawyers’ *ex parte* request. But  
21 even if the Court finds that this supposedly new attorney-client communication falls outside the scope of  
22 its order, such a finding would not allow Six4Three’s lawyers to disclose that communication *in camera*.  
23 As explained below, either section 958 of California’s Evidence Code *does not* apply to the alleged  
24 communication—in which case the communication is privileged and cannot be disclosed given  
25 Six4Three’s continued assertion of the privilege—or the section *does* apply and Six4Three’s lawyers can  
26 disclose the communication to the extent the privilege is waived. An *in camera* review is neither  
27 necessary nor procedurally appropriate; Facebook is entitled to review the unprivileged communication.

28 **Clients**—not lawyers—hold the attorney-client privilege. *See* Cal. Evid. Code § 953 (“As used in

1 this article, ‘holder of the privilege’ means: (a) The client[.]”). Lawyers cannot unilaterally betray that  
2 privilege. Instead, section 955 of the California Evidence Code provides that a lawyer “**shall claim** the  
3 privilege whenever he is present when the communication is sought to be disclosed and is authorized to  
4 claim the privilege under subdivision (c) of Section 954.” Cal. Evid. Code § 954 (emphasis added). Of  
5 course, Six4Three may waive that privilege. *See* Cal. Evid. Code § 912. But absent waiver, Six4Three’s  
6 lawyers cannot disclose confidential communications to the Court—even in support of a motion to  
7 withdraw. *See* Mark L. Tuft, et al, *California Practice Guide: Professional Responsibility* § 10.24.5  
8 (“Attorneys are bound to preserve client confidences even when seeking to be relieved as counsel.”).  
9 And neither Facebook nor the Court has received any communication from Six4Three suggesting that  
10 Six4Three waived privilege as to the “attorney-client communication” that forms the basis of this *ex*  
11 *parte* application.

12 For this reason, Six4Three’s lawyers’ *ex parte* application goes all-in on a statutory privilege  
13 exception codified by section 958 of the California Evidence Code. *See Ex Parte* Appl. at 5:12–25. That  
14 section provides that there is no attorney-client privilege as to “a communication relevant to an issue of  
15 breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.” Cal. Evid.  
16 Code § 958. But Six4Three’s lawyers give **no authority**—and Facebook’s research has found none—for  
17 the proposition that a lawyer may invoke section 958 to disclose privileged client communications in an  
18 effort to withdraw from representing the client. *See Ex Parte* Appl. at 5:12–25; *see also, e.g., Anten v.*  
19 *Superior Court*, 233 Cal. App. 4th 1254, 1259 (2015), *as modified* (Feb. 10, 2015) (“The wording of  
20 Section 958 is broad, but case law has clarified that the exception is limited to communications between  
21 the lawyer charging or charged with a breach of duty, on the one hand, and the client charging or charged  
22 with a breach of duty[.]”); *Glade v. Superior Court*, 76 Cal. App. 3d 738, 746 (1978) (section 958 applies  
23 only when “either the *attorney or client* charges the other with a breach of duty arising from their  
24 professional relationship.”) (emphasis added); *Schlumberger Ltd. v. Superior Court*, 115 Cal. App. 3d  
25 386, 393 (1981) (“Privileged communications do not become discoverable because they are related to  
26 issues raised in the litigation.”).

27 In any case, even if Six4Three’s attorneys were correct that section 958 allows them to disclose  
28 the privileged communication at the heart of the *ex parte* application, the section does not allow them to

1 selectively disclose the communication. By its terms, section 958 provides that, “[t]here is no privilege  
2 under this article as to a communication relevant to an issue of breach[.]” (emphasis added”). Thus,  
3 invocation of the statutory section eliminates any claim of privilege and any basis for Six4Three’s  
4 lawyers to withhold the communication from Facebook. The contrary assertion in the *ex parte*  
5 application that section 958 “bars other parties to the action, including opposing counsel, from accessing  
6 any such information disclosed to the Court *in camera*” is entirely unsupported. While *Brockway v. State*  
7 *Bar of Cal.*, 53 Cal. 3d 51, 63 (1991), does hold that section 958 “only authorizes disclosure of relevant  
8 communications between a client . . . and an attorney charged with professional wrongdoing,” there is no  
9 discussion whatsoever of preventing opposing counsel from reviewing those communications. In other  
10 words, counsel for Six4Three have not cited a single case that would allow them to assert section 958 to  
11 eliminate privilege vis-à-vis the Court but not vis-à-vis Facebook. If, in fact, the “critical new  
12 information” is that Six4Three has alleged that its counsel breached any duty arising from their  
13 professional relationship, and Birnbaum & Godkin and Gross & Klein seek to use those allegations as an  
14 independent basis for withdrawal, privilege no longer applies and Facebook is entitled to review the  
15 relevant evidence and to be duly heard on its implications on the withdrawal request.

16 Finally, again, even if Six4Three’s lawyers *could* selectively disclose privileged communications  
17 under section 958, they cannot do so with respect to *this* communication: The Court’s crime-fraud ruling  
18 waived privilege as to communications reasonably related to Six4Three’s disclosure of Facebook’s  
19 confidential and highly confidential information. For the reasons above, *see* pp. 4-5, *supra*, that ruling  
20 encompasses the attorney-client communication behind this *ex parte* application. There is no basis for  
21 Facebook or the Court to believe that the communications of the last week are somehow distinct from the  
22 disclosure of Facebook’s confidential information. Facebook has been trying to get to the bottom of the  
23 disclosure for months; counsel cannot claim with any credibility that they were suddenly—and  
24 conveniently—communicating about something unrelated.

### 25 III. CONCLUSION

26 In view of the above, Birnbaum & Godkin’s and Gross & Klein’s request to submit “new  
27 information” *in camera* must be rejected. Any supposed new information supporting withdrawal must be  
28 brought via a duly noticed motion, to the extent (and only to the extent) authorized by Code of Civil

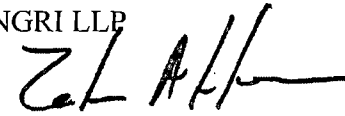


1 Procedure section 1008. And because “new information” about the supposed “unwaivable conflict” is  
2 either subject to the crime-fraud exception or claimed to be subject to the attorney-client privilege  
3 exception found in section 958, that information must be presented to both the Court and to Facebook for  
4 full briefing and argument. The *ex parte* application should be denied.

5  
6 Dated: March 25, 2019

DURIE TANGRI LLP

7  
8 By: \_\_\_\_\_



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**PROOF OF SERVICE**

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On March 25, 2019, I served the following documents in the manner described below:

**DEFENDANT FACEBOOK, INC.'S OPPOSITION TO BIRNBAUM & GODKIN, LLP  
AND GROSS & KLEIN, LLP'S EX PARTE APPLICATION REQUESTING LEAVE  
TO SUPPLEMENT THE MOTION TO BE RELIEVED AS COUNSEL**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from zabrahamson@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

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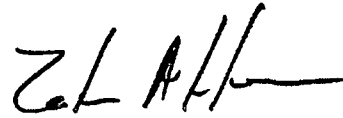
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1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct. Executed on March 25, 2019, at San Francisco, California.  
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